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No. 85-994

# In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM H. PFLAUMER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that there was no reasonable probability that the government's failure to disclose a witness immunity agreement could have affected the outcome of petitioner's trial.

2. Whether the government bears the burden of showing that the outcome of the trial would not have been affected by the disclosure of withheld information.

3. Whether an error in the district court's jury instructions relating solely to the proof necessary to convict petitioner of conspiracy requires reversal of petitioner's conviction on 21 substantive counts of mail fraud.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A69-A118) following remand by this Court for further consideration in light of *United States* v. *Bagley*, No. 84-48 (July 2, 1985), is reported at 774 F.2d 1224. The initial opinion of the court of appeals (Pet. App. A13-A68) is reported at 740 F.2d 1298. The memorandum and opinion of the district court (Pet. App. A1-A12) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on October 9, 1985. A petition for rehearing was denied on November 4, 1985 (Pet. App. A119). The

petition for a writ of certiorari was filed on December 10, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on 21 counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371. He was sentenced to two concurrent terms of three years' imprisonment, a suspended three-year term of imprisonment, and fines totaling $25,000. Initially, the court of appeals reversed (Pet. App. A13-A67, A68). Thereafter, on July 2, 1985, this Court granted the government's petition for a writ of certiorari, vacated the judgment, and remanded the case for further consideration in light of *United States* v. *Bagley*, No. 84-48 (July 2, 1985). On remand, the court of appeals affirmed (Pet. App. A69-A118).

1. The evidence is summarized in the opinion of the court of appeals (Pet. App. A74-A80). It showed that petitioner owned a Philadelphia brewery known as C. Schmidt & Sons, Inc. and a Philadelphia trucking company named Wm. H.P., Inc. (WHP). In late 1976, petitioner, together with several others, commenced a scheme to defraud the states of Pennsylvania, Maryland, and New Jersey of tax revenues owed to them for fuel delivered to WHP. The scheme involved altering invoices for diesel fuel delivered to WHP's Philadelphia terminal in order to indicate, falsely, that the fuel was delivered to WHP in Maryland and New Jersey. This falsification permitted the mailing of underreported state fuel excise taxes to Pennsylvania, where the fuel was actually delivered,

and the mailing of false claims for road use credits to Maryland and New Jersey, where the fuel was neither delivered nor used. Pet. App. A74, A84-A85.

Frank Jock, a fuel supplier, testified under an agreement with the government for preferential treatment with the Parole Board. Jock stated that the scheme was formed at a meeting attended by petitioner, co-defendant Harold Oxman, and union leader John McCullough. Jock said that at the conclusion of this meeting, petitioner called in co-defendant Charles Gillan, President of WHP, and instructed Jock to explain the scheme to him.[1] Thereafter, the actual day-to-day operation of the scheme, including the ordering of the diesel fuel, became the responsibility of Gillan and employees under his supervision. Jock's son Michael corroborated this testimony. Pet. App. A74-A76.

John Luciano, another fuel supplier, testified under an agreement for preferential treatment at sentencing. He stated that in late 1977 or early 1978, Oxman and McCullough proposed that Luciano's company become WHP's fuel supplier under the same tax fraud scheme. Luciano subsequently met with petitioner, who asked if Luciano had "worked everything out" with the manager of WHP's Philadelphia terminal (Pet. App. A76). Thereafter Luciano's company delivered fuel to WHP, falsely showing that the deliveries were made in Maryland and New Jersey. *Ibid.*

The government also called as witnesses four employees of WHP—the office manager, two accountants and the comptroller, Ralph Wille. Wille, in his direct testimony, stated that petitioner's primary inter-

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[1] Gillan pleaded guilty before the trial commenced.

est was the operation of the brewery. However, Wille further stated that petitioner directed the "financial end" of WHP's business (Pet. App. A77). Wille said that he spoke to petitioner about finances several times a week and that the office manager talked to petitioner several times a day. Wille's testimony was corroborated by other witnesses. Pet. App. A77-A78.

Petitioner did not testify. Instead, he attempted to show, through the testimony of three witnesses, that he lacked knowledge of the fraudulent scheme. Petitioner's secretary testified that petitioner met with Jock only to discuss heating fuel for the brewery. The brewery president testified that petitioner spent nearly all his time running the brewery and had delegated the running of the trucking company to Gillan. Co-defendant Raymond Hill, manager of WHP's Philadelphia terminal, stated that Gillan was the active figure in WHP's affairs, including arranging for fuel suppliers. Pet. App. A78-A79.

As the closing arguments reveal, both the government and the defense placed central emphasis on the testimony of two government witnesses, Jock and Luciano. The government's argument concentrated on their testimony, making no mention of Wille or his testimony (see C.A. App. 1294-1331, 1413-1429). It also emphasized that petitioner, as sole owner of WHP, was the only person at the company who stood to gain from the fraudulent scheme (*id.* at 1416-1417). Defense counsel strenuously attacked the credibility of Jock and Luciano (*id.* at 1339, 1347-1375), pointedly stating that "Frank Jock is the only witness who testified in this courtroom that Billy Pflaumer was aware of what Chuck Gillan had set in motion" (*id.* at 1361). The defense mentioned

Wille's testimony only once, specifically characterizing it as exculpatory (*id.* at 1363).[2]

2. Before trial, petitioner had requested that the government produce any documents evidencing either agreements with or benefits given to any prospective government witness, together with other forms of "*Brady*" material. See *Brady* v. *Maryland*, 373 U.S. 83 (1963). The government, in response, disclosed that it had agreed to advise the Parole Board that Jock was cooperating and would be a good candidate for parole on the sentence he was then serving. It also disclosed that it had agreed to forego further prosecution of Luciano, who had pleaded guilty to the conspiracy count and to tax evasion, and to report his cooperation at sentencing. The government did not disclose a letter stating that, in return for Wille's "cooperation and testimony * * * relative to the federal investigation into certain activities of Charles Gillan and others during the period between June 2, 1978 and December, 1979," Wille would be given use and derivative use immunity for any statements he made in connection with that investigation (see Pet. App. A19 n.3; C.A. App. 1529-1531).

Following petitioner's conviction, defense counsel learned of that letter and, claiming a *Brady* violation, moved for a new trial. The district court denied the motion. The court stated that "a new trial is

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[2] Petitioner's counsel stated (C.A. App. 1363):

> Ralph Willie and Bob Gold both testified at the Government's request, that they got their orders to implement what was happening here from Gillan. Willie says he went around to Gillan and asked him whether he was aware of it, and Gillan said "Yes. I'm aware of it."
>
> And Willie makes it perfectly plain that he didn't bring it to Bill Pflaumer's attention.

warranted when suppressed evidence might have affected the outcome of a trial" (Pet. App. A10), noting further that "[w]here the requested information is not material, the government has no duty to turn it over [to] the defense" (*id.* at A11). The district court recognized that "[i]n determining whether information is material, courts 'have framed the test in terms of that which is reasonably likely to have changed the jury's judgment' " (*ibid.*, quoting *United States* v. *McCrane*, 527 F.2d 906, 911 (3d Cir. 1975)). The court ruled that the letter was not material, stating that, in view of the testimony of Jock and Luciano, "the testimony of Ralph Wille was merely cumulative" and "even if the defense had been able to impeach Mr. Wille with the requested information, the outcome of the trial would have been the same" (Pet. App. A11).

A divided court of appeals reversed (Pet. App. A13-A68). The majority concluded that petitioner was entitled to a new trial because "the government withheld specifically requested *Brady* material" (Pet. App. A59). It described the Wille immunity agreement as "significant impeachment evidence" (*id.* at A53), stating that the "prosecutor should have appreciated that the disclosure of the existence of substantial benefits conferred on all of the government's principal incriminatory witnesses might have led the jury to doubt their truthfulness" (*ibid.*). It concluded that the government's nondisclosure was constitutional error and that the error was not harmless beyond a reasonable doubt (*id.* at A54, A58).

The court of appeals also ruled that the district court's instructions on the duration of the conspiracy constituted reversible error (Pet. App. A24-A30), even though the court had declined to hear oral argu-

ment on that issue (see *id.* at A66 n.2 (Sloviter, J., dissenting)). The court did not indicate whether that ruling provided an independent basis for reversal of any count other than the conspiracy count; instead, it simply stated that "[b]ecause the trial court erred in rejecting [petitioner's] request for a charge that the jury must find that he joined the conspiracy prior to the last mailing, and because the government withheld specifically requested *Brady* material, his conviction must be reversed" (*id.* at A59).

The government filed a petition for a writ of certiorari limited to the *Brady* issue, in which it explained that the court of appeals' decision on the jury instruction issue was relevant only to the conspiracy count. 84-1033 Pet. 5-6 n.2. This Court granted the petition, vacating and remanding the case for further consideration in light of *United States* v. *Bagley*, No. 84-48 (July 2, 1985).

3. On remand, a divided court of appeals held that the Wille agreement was not, under *Bagley*'s standards, material exculpatory evidence (Pet. App. A71-A83). After carefully reviewing the record, the court stated (*id.* at A83):

> In sum, in light of the totality of other evidence presented, the prosecution's failure to rely on Wille's testimony in closing, and Pflaumer's counsel's use of Wille's testimony in his closing as supportive of Pflaumer's defense, we conclude, as did the trial court, that there is not a reasonable probability that the result of the trial would have been different had the defense been in a position to use Wille's use immunity agreement to cross-examine him. The government's failure to disclose the immunity agreement, in the con-

> text of the facts and full record of this case, does not undermine our confidence in the verdict.

The court also held that the erroneous instruction on the duration of the conspiracy did not afford a ground for reversing petitioner's conviction on 21 mail fraud counts, clarifying its previous ruling on this question (*id.* at A83-A90).

Judge Gibbons dissented (Pet. App. A91-A116). He stated that *Bagley* did not change the requirement that the government bear the burden of showing nonmateriality to the satisfaction of the reviewing court and that use of the Wille agreement for impeachment purposes might have led the jury to doubt Wille's testimony that petitioner was actively involved in WHP's financial affairs (*id.* at A108-A116). He also was of the view that the jury instruction error required reversal of all the counts of the indictment (*id.* at A98-A104).

## ARGUMENT

1. Petitioner contends that the court of appeals erroneously applied this Court's recent recision in *United States* v. *Bagley*, No. 84-48 (July 2, 1985). He argues that the court should have given special weight to defense counsel's "specific request" for the nondisclosed information and to the possibility that the defense might have changed its trial strategy had this information been available (Pet. 12). These contentions are insubstantial and do not warrant further review.

The court of appeals' analysis is fully consistent with *Bagley*. That decision emphasizes that "suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial" (slip op. 10). Thus, "a constitutional error

occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial" (*ibid.*). *Bagley* specifically directs that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" (slip op. 14 (plurality); slip op. 1 (White, J., concurring)).[3]

Petitioner does not dispute that the court of appeals correctly identified these principles. Instead, he simply faults the court's application of the *Bagley* standard to the specific facts of his case, asserting that the court failed to give sufficient weight to his "specific request" for impeachment evidence (Pet. 14). However, it is a considerable stretch to say that petitioner made a "specific request."[4] His re-

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[3] The court of appeals' original decision reversing the conviction was plainly at variance with *Bagley*. Indeed, "[t]he standard applied by the district court was close to that adopted by the Supreme Court" (Pet. App. A81). The district court "correctly focused on the reasonable probability that, had the Wille agreement been disclosed, the result would have been different" (*ibid.*).

[4] Petitioner did not request specific information concerning any particular witness that gave the prosecutor "notice of exactly what the defense desired." *United States* v. *Agurs*, 427 U.S. 97, 106 (1976). Instead, he submitted a nine-page, 41 paragraph "form" discovery request that included, as part of one paragraph, a request for "any and all promises, understandings, or agreements" between "the prosecution, its agents and representatives and persons (including counsel for such persons) whom the government intends to call as witnesses at trial" (Pet. App. A18 n.2; see C.A. App. 1508-1516). This type of inquiry, which "really gives the prosecutor no better notice than if no request is made" (*Agurs*, 427 U.S. at 106-107), does not qualify as a specific request. Compare, *e.g.*,

quest was no more "specific" than that involved in *Bagley*. See *Bagley*, slip op. 1. In any event, the *Bagley* standard is, by its own terms, "sufficiently flexible" to cover all instances of nondisclosure of evidence favorable to the accused, be it a "no request," a "general request," or a "specific request" situation (slip op. 14 (plurality); slip op. 1 (White, J., concurring)). In each case, the inquiry remains the same—whether there exists a reasonable probability that, had the information been disclosed, the result of the proceeding would have been different.

The court of appeals, upon careful examination of the record, properly concluded that disclosure of the Wille immunity agreement would not have changed the outcome of the trial. Indeed, the district court, correctly anticipating the *Bagley* standard, had reached a similar result. This fact-bound determination does not warrant further review from this Court. Indeed, the district court's assessment of materiality merits particular deference since the trial judge is best situated to determine the likely impact, if any, that disclosure would have had on the trial proceedings. Cf. *United States* v. *Agurs*, 427 U.S. at 114. Here, in addition, the court of appeals indicated it "would reach the same conclusion * * * [e]ven on a completely independent review of the record" (Pet. App. A82).

Petitioner strains credulity in suggesting that disclosure of the Wille immunity agreement might have led to different trial tactics sufficient to have changed the outcome of this case. Petitioner's argument relies on the mistaken contention that Wille was a crucial prosecution witness and that the immunity agree-

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*Brady* v. *Maryland*, 373 U.S. at 84 (specific request for accomplice's extrajudicial statements).

ment could have been used to impeach Wille "as another witness who had bought his freedom by implicating Pflaumer" (Pet. 15).

First, Wille was a minor witness whose testimony was essentially cumulative and added little to the government's case. The government's central witnesses were Jock and Luciano, who directly described petitioner's participation in the fraudulent scheme. Wille, by contrast, testified that while petitioner's primary interest was the operation of a brewery, he also directed the "financial end" of the trucking business (Pet. App. A77). This testimony merely tended to corroborate the far more important testimony of Jock and Luciano. The testimony was similar to that provided by other WHP employees concerning petitioner's involvement in the "financial end" of the trucking company (*id.* at A77-A78; see *id.* at A11). As the court of appeals noted (*id.* at A79-A80), the government did not even mention Wille in its closing argument; instead, the government focused upon the directly incriminating testimony of Jock and Luciano and the reasonable inferences that could be drawn from petitioner's actions and his ownership of the company. Wille was in no sense a key government witness; his testimony was only one small element from a substantial array of inculpatory evidence, "both direct and circumstantial, from multiple and corroborating sources" (*id.* at A82).[5]

Second, Wille's immunity agreement had dubious impeachment value. Petitioner inaccurately depicts

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[5] Much of Wille's testimony was actually consistent with defense counsel's theory that petitioner lacked knowledge of the tax fraud scheme. Indeed, defense counsel, in his closing argument, characterized Wille's testimony as exculpatory (C.A. App. 1363).

the agreement as Wille's attempt to "[buy] his freedom" (Pet. 15). This characterization cannot withstand analysis. The agreement related to a separate investigation of different offenses, was limited to use and derivative use immunity (*not* transactional immunity), and reserved the government's right to prosecute Wille based on his testimony if it discovered that Wille had "received any benefit" from the activities under investigation. C.A. App. 1529-1531. Unlike Jock, who obtained a benefit from the Parole Board, and Luciano, who was to obtain a benefit at sentencing, Wille received virtually no benefit from his testimony. The government could have compelled his testimony through a formal judicial immunity order. See 18 U.S.C. 6002. The use immunity agreement left Wille no better off than if he had refused to cooperate and the government then requested the court to compel his testimony through a grant of use immunity. See *Kastigar* v. *United States*, 406 U.S. 441 (1972); *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 79 (1964).

Finally, the court of appeals' finding of nonmateriality is buttressed by the jury's conviction of Harold Oxman, a co-defendant at trial. Wille's testimony was irrelevant to that defendant; Oxman was convicted essentially on the testimony of Jock and Luciano. Thus, the jury must have credited the testimony of those two witnesses. As the district court correctly recognized, "even if the defense had been able to impeach Mr. Wille with the requested information, the outcome of [petitioner's] trial would have been the same" (Pet. App. A11). In short, there is no reasonable probability that the result of the proceeding would have been different if the use immunity agreement letter had been produced.

2. Petitioner also argues that this Court's review is warranted because the court below did not discuss who bore the "burden of nonpersuasion" (Pet. 18-22). However, *Bagley* does not require the former assignment of a burden of persuasion as a necessary part of the legal analysis. Indeed, that assignment would not have made any difference in this case. The court of appeals—like the district court—was *fully persuaded* that even had the evidence been disclosed, there was no reasonable probability that the result of the trial would have been different (Pet. App. A83).[6] Thus, this purported issue does not warrant further review.

3. Finally, petitioner argues (Pet. 22-24) that his conviction on 21 counts of mail fraud must be reversed because the trial judge erred in instructing the jury on the related conspiracy charge. The court of appeals, in its first opinion, found error in the judge's failure to instruct the jury that the conspiracy ended once the last mailing of fraudulent tax and road use claims took place. The court, in its second opinion, expressly stated that the error required reversal only of the conspiracy count. Petitioner contends that "the erroneous conspiracy instruction had infected the entire conviction because it invited the jury to convict [petitioner] vicariously for the 21 mail fraud counts once it found him to be a member of the conspiracy" (*id.* at 23).

Petitioner's argument is meritless. The 21 mail fraud counts each charged a separate fraudulent mailing on a specific date prior to June 1979 (Pet.

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[6] Petitioner baldly suggests that "[g]iven the result reached by the court, it is safe to assume the court placed the burden on the defendant" (Pet. 19). Petitioner's non sequitur is, of course, untenable.

App. A88-A89). The jury was instructed—separately from the conspiracy charge—on each of those counts.[7] Thus, the jury fully understood that petitioner was charged with discrete instances of mail fraud occurring on particular dates. It must have found that petitioner actually participated in the mail fraud in each of those instances. Contrary to petitioner's suggestion (Pet. 23), the jury received no instructions permitting it to find petitioner vicariously liable for the substantive offenses committed by his co-conspirators (Pet. App. A89). Compare *Pinkerton* v. *United States*, 328 U.S. 640, 645 n.6 (1946). Thus, any error in the conspiracy instructions could not have affected the validity of the verdict on the substantive offenses.

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[7] Petitioner contends (Pet. 23) that the jury might have applied the instructions concerning conspiracy to convict him of the substantive counts. However, the district judge's careful articulation of the instructions prevented this from occurring. The court first instructed the jury on the substantive counts (C.A. App. 1449-1456), specifically stating, among other matters, that each count represents a separate crime, that each defendant's guilt must be considered separately, that the finding that some defendants are guilty of some charges does not control the verdict with respect to other defendants or charges, and that the crimes each require proof of specific intent (*id.* at 1453). He then gave the aiding and abetting instructions, carefully explaining the willfulness requirements (*id.* at 1456-1458). Finally, the judge specifically instructed the jurors on the requisites for conspiracy (*id.* at 1458-1469), delineating what was necessary "to find any defendant guilty *on Count 22*" (*id.* at 1458 (emphasis added)). Because the judge carefully distinguished between the requirements for the substantive counts and the conspiracy count, there is no reasonable possibility that the jurors would have been confused.

Indeed, we submit that the convictions on the substantive counts demonstrate that any error in the conspiracy instruction was necessarily harmless. The jury, applying the judge's instructions on the substantive counts, must have found that petitioner became a participant in the mail fraud scheme prior to June 1979. We noted this point in our petition for certiorari seeking review of the court of appeals' earlier decision (84-1033 Pet. 5-6 n.2). However, we declined to seek further review of the court's mistaken but fact-bound ruling on the conspiracy instruction. In granting our petition, vacating and remanding, this Court implicitly agreed with our submission that the ruling's impact was limited to the conspiracy conviction and would not affect the petitioner's conviction on the 21 mail fraud counts. The court of appeals, on remand, expressly stated that the mail fraud convictions were unaffected by its previous ruling. That determination does not merit further review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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